2011 - 2011

No. 10-434

IN THE

Supreme Court of the United States

CITY OF SANTA ROSA; RICHARD CELLI, Police Officer; TRAVIS MENKE, Police Officer; and PATRICIA MANN, Police Officer of the SANTA ROSA POLICE DEPARTMENT,

Petitioners,

v.

PATRICIA DESANTIS, Guardian Ad Litem; RICHARD DESANTIS, deceased, and as Guardian Ad Litem; DANI DESANTIS, a minor, TIMOTHY FARRELL, a minor; DRIANNE DESANTIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

Pursuant to Supreme Court Rule 15.6, Petitioners City of Santa Rosa, Richard Celli, Travis Menke and Patricia Mann submit the following Reply Brief in support of their Petition for Writ of Certiorari.

I. THE PETITION INVOLVES IMPORTANT ISSUES OF LAW AND NOT DISPUTED ISSUES OF FACT

Respondents inaccurately attempt to characterize this case as one involving triable issues of fact surrounding the issue of qualified immunity for obvious reasons. There is no genuine dispute over the material facts in this case that are necessary to resolve the issue of qualified immunity. Respondents attempt to mischaracterize the issue of reasonableness as a factual issue. Whether the Petitioners were entitled to qualified immunity is a question of law to be determined by the court. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Hunter v. Bryant*, 502 U.S. 224 (1991); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

The facts that are not in dispute are:

1. The entire incident transpired in approximately two minutes from the time the officers arrived on scene until shots were fired;

2. The officers were responding to a call of shots fired in a residence by Mr. DeSantis in which Mr. DeSantis's wife and children were present;

3. Additional shots were fired while the officers were en route;

4. The officers had not had any opportunity to search Mr. DeSantis for weapons;

5. The officers gave commands to Mr. DeSantis to stay down on the ground – he failed to comply;

6. Mr. DeSantis unexpectedly and suddenly jumped up and charged at the officers who had their weapons drawn on him;

7. A less lethal use of force failed to stop Mr. DeSantis from advancing on the officers;

8. The officers were required to make a split second decision whether to use deadly force to protect themselves from what they perceived as a threat to their safety, the safety of their fellow officers and the public at large;

9. The officers did not take any action prior to Mr. DeSantis unexpectedly charging at them to provoke him or escalate the situation.

After the fact, it was discovered that Mr. DeSantis did not have a weapon on him. Even without a visible weapon, Mr. DeSantis still presented a real and potential threat to the officers whom he could have overpowered and taken their weapons. A reasonable mistake of fact by the officers assessing the situation is precisely the type of situation which the doctrine of qualified immunity is intended to protect the officers from. *Pearson v. Callahan* ___ U.S. ___; 172 L.Ed 565; 129 S.Ct 808 (2009). The correct inquiry is not "whether another reasonable or more reasonable interpretation

of the events can be constructed . . . after the fact." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

The real issues as identified in the Petition are over the appropriate standards used to determine whether the officers acted reasonably, and are therefore entitled to qualified immunity.

As more specifically articulated in the Petition, Petitioners contend that there is a lack of clarity in existing legal precedent as to the appropriateness of a court's consideration of other force alternatives available to an officer, or other officers present at the scene, who are forced to make a split second decision when a suspect is a threat to the officers. There is no precedent in any Federal Circuit Court which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force is ultimately justified. There are, however, cases which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to first use non-deadly alternatives. *Plakas v. Drinski*, *supra*, 19 F.3d 1148 (7th Cir. 1994). This holds true in the Ninth Circuit as well. *Scott v. Henrich*, *supra*, 39 F.3d at 915 (9th Cir. 1994). This court should resolve any doubt regarding this issue.

Here, there is no clear authority that would have placed the officers on notice that under the circumstances presented in this case, that they were violating Mr. DeSantis's constitutional rights. Thus, even assuming arguendo, a constitutional violation could be shown, the officers would still be entitled to qualified immunity because the law was not clearly established.

Saucier v. Katz, 533 U.S. 194, 200; 121 S.Ct. 2151; 150 L.Ed.2d 272 (2001).

The court should also be aware of the similarity of issues raised by another Petition pending before the court: *William Morris Jr., et al. v. Robert Swafford*, 2010 WL 3422565 (C.A. 11 (Fla)) petition for cert. filed November 29, 2010 (No. 10-712). In *Morris*, an Eleventh Circuit case, two sheriff deputies were searching a large open field for felony car burglars when they were confronted by the plaintiff Robert Swofford who had a gun. The deputies shot Swofford, who was approximately 20-25 feet away from the deputies at the time he was shot, believing that he would fire at them and that their lives were in danger. The petition raises the question as to whether a pre-use of force warning as discussed in *Tennessee v. Garner*, 471 U.S. 1 (1985) should apply in a self defense case where there is no time to give a warning. The petition in *Morris* points out, similar to the petition here, that this Court has not articulated the standard for evaluating the use of deadly force when a suspect armed, or reasonably believed to be armed, is approaching, as opposed to fleeing, and presents a direct threat to the officer which forces the officer to make a split second decision in order to protect themselves.

II. THE PETITION PRESENTS IMPORTANT ISSUES OF PUBLIC POLICY WHICH THE COURT SHOULD PROVIDE CLEAR GUIDANCE AND DIRECTION ON TO THE LOWER COURTS

Although this court recognized in the seminal case of *Graham v. Conner*, 490 U.S. 386(1989) this type of scenario in which officers are force to make these split

second type of decisions under tense circumstances– "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments–in circumstances that are tense, uncertain and rapidly evolving–about the amount of force that is necessary in a particular situation."– no specific authority has articulated in a clear and meaningful manner the appropriate factors to be considered when a suspect is advancing on an officer causing an imminent threat of harm. The lower courts need guidance as to the appropriate factors to evaluate the constitutionality of deadly force in such circumstances understanding that the perspective from which such conduct should be judged is that of the officer on the scene and not from 20/20 hindsight. *Graham., id* at 394.

As pointed out by the Petition in *Morris,* the analysis in *Garner,* which is a completely different scenario from that at issue in this case and in *Morris,* fails to provide sufficient guidance to the courts in making this evaluation.

Additionally, this Court should make clear that, consistent with its prior rulings on the issue of qualified immunity, considerations of other force alternatives in the scenario presented in this case are not appropriate in evaluating the entitlement to qualified immunity.

As pointed out by Justice O'Scannlain in the dissenting opinion below, the qualified immunity doctrine would serve no purpose if it was applied in the manner it was by the Ninth Circuit below (Dissent, page 6, Appendix A to Petition). Officers should not be forced to unnecessarily risk their lives out of fear of being sued

for making a split-second decision to protect themselves. The officers in this case did absolutely nothing to provoke or cause Mr. DeSantis to unexpectedly charge at them and had valid reasons to believe that he was armed at the time and that their lives were in danger. Their actions should not be judged from the 20/20 hindsight of knowing that in fact Mr. DeSantis was not armed at the time or having the luxury of time to consider other alternatives–valuable time that the officers did not have when forced to act.

CONCLUSION

Petitioners respectfully request for the reasons set forth herein and in their Petition that the court grant certiorari to review these important public safety and constitutional issues.

Respectfully submitted,

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